Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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| In the Matter of | ) | |
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| Examination of Current Policy Concerning | ) | GC Docket No. 96-55 |
| the Treatment of Confidential Information | ) | |
| Submitted to the Commission | ) | |



# REPLY COMMENTS OF JOINT PARTIES

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## SUMMARY

In comments, the Joint Parties demonstrated that increasing competition in the telecommunications marketplace and express provisions of the Telecommunications Act of 1996 make it essential to afford increased protection for confidential commercial and financial information provided to the Commission. The Joint Parties analyzed the various types of Commission proceedings discussed in the **Notice** and recommended specific changes in the Commission's Rules to better balance the competing interests of public access to information in the possession of the government and the protection of confidential or proprietary information submitted to the government during the regulatory process.

In order to provide an objective standard for determining whether information is confidential commercial information, the Commission may wish to follow the lead of the Commerce Department and enumerate in its Rules categories of information the release of which would cause substantial competitive harm to the submitter. Such information would be exempt from disclosure absent a "persuasive showing" by the requester that the public interest requires disclosure.

Where the balance favors disclosure, the Commission may be able to utilize protective agreements or redaction to permit limited disclosure necessary to conduct Commission proceedings while still protecting the confidentiality or proprietary interests of the submitter and the public interest in effective competition.

Specifically, the Commission should not permit its regulations to be used by certain parties to Commission proceedings to obtain an unearned competitive advantage. To

avoid this unintended result, the Commission should provide increased protection to information submitted by carriers in support of their tariffs. The cost that a party incurs to provide a service is clearly the type of information that would cause substantial competitive harm if disclosed. MCI's assertion that cost information submitted with tariffs must be disclosed is erroneous as a matter of law and inappropriate as a matter of policy.

Nothing in the Communications Act requires that cost support information be submitted with tariffs. Such information is required as a matter of policy to assist the Commission in deciding whether to suspend or investigate the tariff filing. The Commission's requirement to file cost support information does not confer important procedural benefits upon individuals. It is solely within the discretion of the Commission to require that such information be filed, and to decide whether such information should be disclosed to third parties. Given that the Communications Act does not require cost support at all, it is ludicrous for MCI to assert that the Act requires LECs to make cost support available to all interested parties without limitation and without any opportunity to protect confidential or proprietary information. The Commission should take this opportunity to provide additional protection of cost support information in tariff review proceedings.

The Commission should reiterate its present policy of not permitting disclosure of audit information. To do so would impair the ability of the Commission to obtain information from carriers in future audits. The Commission should also clarify that the staff has no delegated authority to release audit information, since the release of such information is an exception to the Commission's general policy of nondisclosure.

The Commission should reject the efforts of Time Warner to strip the Model Protective Order proposed in the **Notice** of essential protections. If adopted, the proposals of Time Warner would make protective agreements less effective and more difficult to enforce. This, in turn, would make submitters less likely to agree to provide information pursuant to a protective agreement.

Finally, the Commission should reject the proposal to GCI to emasculate the Critical Mass standard by defining all information submitted in connection with a Commission proceeding as a "required" submission. GCI's suggestion is contrary to the case law and to the views of the Department of Justice.

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**REPLY COMMENTS OF JOINT PARTIES**

Ameritech, The Bell Atlantic Telephone Companies, Bell Communications Research, Inc., NYNEX Corporation, Pacific Bell and Nevada Bell, US West, Inc. and BellSouth Corporation ("Joint Parties") hereby reply to the Comments received by the Commission in the captioned proceeding in response to the Notice of Inquiry and Notice of Proposed Rulemaking, FCC 96-109, released March 25, 1996 ("**Notice**").

In the Comments, the Joint Parties demonstrated that the increasingly competitive telecommunications marketplace and the Telecommunications Act of 1996 require additional protection for confidential commercial and financial information provided to the Commission in regulatory proceedings.[1] The Joint Parties recommended that for information submitted "voluntarily",[2] the Commission adopt the Critical Mass standard that such information is exempt from disclosure "if it is a kind that would customarily not

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[1] In using the FOIA statutory language confidential commercial or financial information in this pleading, the Joint Parties include trade secrets, information subject to patent or copyright protection, and other proprietary information such as computer software, proprietary models, and other intellectual property the disclosure of which could damage the party providing the information, all of which are encompassed by the term "confidential commercial or financial information".

[2] Under Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992)("Critical Mass"), information is considered "voluntarily submitted" if its submission is not required by a Commission rule or regulation, and it has not been obtained through a subpoena or other legal compulsion. See Part III, infra.

be released to the public. "For information that is "required" to be submitted, the Commission should apply the two prongs of the National Parks[3] test: public disclosure will not be required if release of the information is likely to "impair the Government's ability to obtain the necessary information in the future" or to "cause substantial harm to the competitive position of the person from whom the information was obtained."

The Joint Parties proposed specific standards for balancing the conflicting interests implicated by confidentiality requests in different types of Commission proceedings. In those situations where the balance favors disclosure, the Commission should utilize protective orders or agreements to limit disclosure to interested parties in particular proceedings. In other circumstances, such as audits, the "impairment" prong of National Parks precludes disclosure altogether.[4] The Joint Parties proposed specific changes to the Commission's Rules and to the Model Protective Order attached to the **Notice** to accomplish these objectives. In these Reply Comments, the Joint Parties respond to the recommendations of other parties to this proceeding.

## I. The Commission must not permit its regulations to confer an unearned competitive advantage or permit one to be obtained by some market participants.

As the telecommunications industry becomes increasingly competitive, it is essential that regulation not confer an unearned competitive advantage or permit one to be obtained by certain market participants. In order to prevent this unintended result, the

[3] National Parks and Conservation Ass's. v. Morton, 498 F.2d 765 (D.C. Cir. 1974)("National Parks").

[4] In exceptional circumstances, it may be appropriate to redact confidential information from an information source or to release aggregated or summary information to the public.

Commission must allow carriers to avail themselves of the protection afforded by Exemption 4 of the Freedom of Information Act. Exemption 4 authorizes the Commission to refuse disclosure of "trade secrets and commercial or confidential information obtained from a person and privileged or confidential."[5]

As SBC Communications, Inc. ("SBC") observes:

> . . . [B]ecause of the evolution from regulation to competition in the telecommunications industry, the Commission should abstain from compelling industry participants to routinely file confidential information that they would not make generally available to the public on a voluntary basis. The presumption should now be that a carrier's confidential information will remain confidential.[6]

Thompson Hines and Flory, P.L.L. ("TH&F") asserts:

> [W]e submit that the Commission should adopt a general policy that confidential information must be protected and that the Commission will take affirmative efforts, by agreements, protective orders, or documents under seal, to see that commercially sensitive information does not reach any competitors.[7]

Aitken Irvin Berlin Vrooman & Cohn, L.L.P. ("Aitken") notes that the Commerce Department has adopted rules[8] that enumerate specific types of factual information that are considered proprietary upon the designation of the submitter, including, inter alia, business or trade secrets; production costs; distribution costs; terms of sale not offered to the public; individual sale prices; the names of particular customers, distributors or suppliers; the names of particular persons from whom proprietary information was

[5] 5 U.S.C. Sec. 552(b)(4).
[6] SBC at 2.
[7] TH&F at 2.
[8] 19 C.F.R. Sec. 353.4(b).

obtained; and any other specific business information the release of which would cause substantial harm to the competitive position of the submitter.[9]

The Joint Parties agree that the Commission should enumerate in its Rules categories of information that are clearly confidential and the release of which would clearly cause competitive harm to the submitter. Such information would be exempt from disclosure unless the person requesting access to such information can make a "persuasive showing" that the public interest requires that it have access to the information. Such an enumeration would provide needed guidance to the Commission staff, would reduce the administrative burden that accompanies a case-by-case evaluation of confidentiality requests, and would promote consistency in the application of the Commission's Rules.[10]

## II. The Commission must afford additional protection to confidential information in the tariff review process.

Most of the disagreement among the commenting parties arises in the area of confidential treatment for tariff support information, with parties required to submit confidential information favoring additional protection and their competitors favoring either the status quo or reduced protection.

GTE notes that the continued submission of confidential information regarding customers, service offerings, pricing development and extensive cost and financial data,

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[9] Aitken at 3.

[10] The Commission should reject MCI's request that the Commission add a requirement that when confidential treatment is requested the burden of proof is on the submitter and not on the requester. MCI at 5. Once the confidential nature of the information is established, either through a list in the Rules or an individual showing by the submitter, the burden is and should remain on the requester to make a "persuasive showing" that the public interest requires release of the information.

without effective rules and procedures in place to protect such information from disclosure, "will place regulated companies at a distinct competitive disadvantage, a result clearly at odds with the intent of the Telecommunications Act of 1996."[11]

SBC notes that it is Commission policy, not the Communications Act, that limits the protection afforded to cost information supporting LEC tariff filings:

> The Communications Act does not require cost support data to be submitted with tariffs, nor does it require that data, if submitted, be made public. . . . Under the Commission's policies, however, the burden of proof is effectively placed upon the party seeking confidential treatment, who must show, by a preponderance of the evidence, that disclosure of cost support data will harm substantially that party's competitive position.[12]

SBC asserts that the Commission's disclosure policies were developed before the advent of competition for local exchange and exchange access services. However, with the development of competition, SBC recommends, and the Joint Parties concur, that:

> Commission Rules should be amended to state specifically that a carrier's cost data will be presumed to be confidential. Carriers should not be required to request confidential treatment with each tariff filing, and the Commission should not waste valuable resources addressing each request. . . . Parties requesting public dissemination of cost information should be required to state compelling arguments for release of the information.[13]

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[11] GTE Services Corporation ("GTE") at 2-3.

[12] SBC at 4-5.

[13] SBC at 7. The Joint Parties disagree with the suggestion of GTE at 3-4 and Cincinnati Bell Telephone Company ("CBT") at 5 that parties requesting confidential treatment file substantiation at the time of the request. See Notice, para. 57. Many documents subject to confidentiality requests are never sought by third parties. Requiring documentation in advance of a request for access to such information will result in largely unnecessary work. The Commission should continue to follow its present practice of notifying the submitter of a request for access to information claimed by the submitter to be confidential and to require the submitter to substantiate the confidential nature of the information at that time. See Joint Party Comments at 25-26. The Joint Parties also oppose the suggestion of CBT at 7 that an affidavit from an officer of the submitting party accompany the confidentiality request. Such a requirement is burdensome and unnecessary, especially if the Commission accepts the suggestion of the Joint Parties that it defer ruling on

Sprint also recognizes that in light of the Telecommunications Act of 1996 and increased competition, the Commission must revise its policies concerning public availability of confidential tariff cost support data:

> The consequences of disclosure of costing information in this [competitive] environment may be more critical today than in the past. In addition, as truly competitive markets develop, the standards for receipt and treatment of cost information associated with tariff filings before the Commission may need to become more stringent in order to prevent competitors form gaining an unfair advantage.[14]

By contrast, MCI is unabashed in its desire to obtain and use LEC tariff cost support information to secure an unearned competitive advantage. MCI makes its pitch for public disclosure of sensitive cost data at the same time that it is increasing its effort to compete with the LECs for the same services. MCI asserts that "information submitted to the Commission by dominant LECs in support of their tariffs must always be disclosed, since Commission rules require such information be made publicly available."[15] MCI cites no support for this assertion. The only rules cited by MCI are sections 61.38 and 61.39, which do not address the issue of public disclosure. MCI also attempts to create a statutory disclosure requirement where none exists:

> Section 203 and 412 or the Communications Act mandate the tariff-filing obligation, as well as the public nature of tariffs. Fundamentally, a tariff is a public document and must be supported with information that is as available to the public as the tariff itself.[16]

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confidentiality requests until the validity of a confidentiality request is contested through a FOIA request.

[14] Sprint Corporation ("Sprint") at 2.

[15] MCI at 14-15.

[16] MCI at 15-16.

MCI cites no authority for this remarkable nonsequitur for obvious reasons: nothing in law or logic dictates that because tariffs are public documents, cost information filed in support of such tariffs must also be made public.

Section 203 of the Communications Act contains no requirement that cost support information be filed at all, much less that such information be made public. Indeed, MCI is subject to Section 203, but it has never filed or made publicly available its cost support information. Contrary to the position advocated by MCI, the courts have held that tariff support information may be exempt from disclosure under FOIA if the requirements of Exemption 4 are met.[17]

Nor do the Commission Rules require that confidential or proprietary cost support data be made public. The **Notice** cites Section 0.455(b)(11) for the proposition that "cost support data are routinely available for public inspection."[18] But Section 0.455 begins with the statement: "Except as provided in Sections 0.453, 0.457 and 0.459, records are routinely available for inspection . . . ." Thus, if cost support data meets the standards for exemption from disclosure under FOIA Exemption 4, as codified in Sections 0.457 and 0.459 of the Commission's Rules, they are not "routinely available for inspection" under Section 0.455(b)(11).

MCI also asserts that "both due process and APA requirements prohibit Commission decisions based on materials not available to parties in such proceedings," citing U.S. Lines v. FMC, 584 F.2d 519 (D.C. Cir. 1978)("U.S. Lines"). U.S. Lines

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[17] See , e.g., Allnet Communications Services, Inc. v. FCC , 800 F.Supp. 984 (D.D.C. 1992), aff'd. per curiam, Allnet Communications Services, Inc. v. FCC , No. 92-5351, 1994 U.S. App. LEXIS 40831, May 27, 1994.

[18] Notice, para. 42.

involved Federal Maritime Commission approval of a joint service agreement among competing carriers. Section 15 of the Shipping Act requires that such approval be granted only after notice and an opportunity for hearing. After a hearing, the FMC first found that the proposed joint agreement was not in the public interest. During reconsideration, the FMC received a series of unreported ex parte contacts from the governments of France and Germany advocating approval of the agreement. Without disclosing the existence of the ex parte contacts or including them in the agency record, the FMC reversed itself and approved the joint service agreement. The Court of Appeals reversed for failure of the FMC to consider the antitrust aspects of the proposed agreement, as required by the Shipping Act.

> Under the Shipping Act, then, the FMC has the responsibility to consider carefully the antitrust aspects of all agreements submitted for its approval. . . . In the case Agreements 9902-3, the Commission has clearly failed to do so, for it neglected to consider adequately an extremely relevant factor: the antitrust implications of the agreement if approved.[19]

In dicta, the Court also chastised the FMC for receiving and apparently relying upon undisclosed ex parte contacts that were not made a part of the administrative record. This, the Court noted, violated the agency's own rules.[20] The language quoted out of context by MCI was thus directed at the FMC's reliance on undisclosed ex parte contacts under a statutory provision calling for notice and an opportunity for hearing. The Court did not have before it any issue regarding confidential information or FOIA Exemption 4. Nothing in U.S. Lines would prevent this Commission from refusing to disclose or

[19] U.S., Lines, 584 F.2d at 528.
[20] U.S. Lines, 584 F.2d at 536.

otherwise make available confidential commercial information submitted on the record in a Commission proceeding.

MCI also cites Sea-Land Service, Inc. v. FMC, 653 F.2d 544 (D.C. Cir. 1981)("Sea-Land"). Sea Land also involved the notice and hearing requirement of Section 15 of the Shipping Act. The Court simply held that:

> the "notice and hearing" requirement in Section 15 contemplates "meaningful public participation"; at the very least, this amounts to the Commission affording any party who stands to be injured by a proposed private agreement the chance to submit statements and data explaining why he believes the newly created agreement should not be approved.[21]

Like U.S. Lines, Sea-Land had nothing to do with the issue of access to confidential information submitted by others pursuant to FOIA Exemption 4. The right to submit data in a proceeding is separate and distinct from the right to access confidential data submitted by others in the proceeding.

Unlike the "notice and opportunity for hearing" requirement of Section 15 of the Shipping Act, Section 203 of the Communications Act does not create any procedural or substantive rights for parties to review confidential cost support materials submitted in the tariff review process. To the contrary, the Courts have made it clear that any cost support materials which may be required to accompany tariff filings are "mere aids to the exercise of the agency's independent discretion" regarding suspension and investigation that do not "confer important procedural benefits upon individuals."[22]

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[21] Sea-Land, 653 F.2d at 551.

[22] American Farm Lines v. Black Ball Freight Services, 397 U.S. 532, 538-9 (1970)("American Farm Lines").

In Municipal Light Boards of Reading and Wakefield Massachusetts v. FPC, 450 F.2d 1341 (D.C. Cir. 1971)("Municipal Light"), the Court held that a cost support filing requirement in the FPC Rules

> does not mean that the public has a right that is enforceable in court to insist on a utility's adherence to this section, either as to contents or timeliness of the utility's filing. . . . [W]e conclude that this requirement does not confer a procedural benefit on other parties that entitles them to secure a judicial reversal in the event of noncompliance.[23]

Likewise, in Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971)("Associated Press"), a case arising under Section 203 of the Communications Act, petitioners argued that cost support information submitted by AT&T in support of its TELPAK tariffs did not establish a "prima facie justification" for the proposed rate increase, and therefore the Commission abused its discretion in not rejecting the tariff. The Court refused to interfere with the agency's exercise of discretion:

> So here the purpose of the Commission's Rule is to provide the Commission with the information necessary to decide whether an investigation and suspension of the proposed rates should be ordered. . . .[24]

In Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), cert. den. sub nom., General Electric Co. v. FCC, 451 U.S. 976, 68 L.Ed.2d 357, 101 S.Ct. 2059 (1981)("ARINC"), the Court dealt specifically with Section 61.38 of the Commission's Rules. The Court held:

> Cost justification information is submitted pursuant to the FCC's tariff filing rules primarily to aid the Commission in exercising its discretion as to investigation and suspension of tariff filings. It follows that the FCC's determination as to what data it requires in making this discretionary decision cannot provide a basis for this court to mandate rejection of the tariff filing. Although another purpose of the tariff filing rules is to provide

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[23] Municipal Light, 450 F.2d at 1354.
[24] Associated Press, 448 F.2d at 1104.

> customers, competitors, and the public with information that will serve as a basis for comment, the rules were not "intended primarily to confer important procedural benefits upon individuals." An agency is permitted to relax, modify, or waive its filing requirements, and such action is not reviewable except upon a showing of substantial prejudice to the complaining party. Given the complaint remedy under the communications Act, no substantial prejudice of an irreparable nature exists in this case.[25]

These cases make it clear that it is solely within the discretion of the Commission whether to require cost support information to accompany tariff filings. It is also within the discretion of the Commission to decide whether to afford third parties access to such information if a filing is required. Given that the Communications Act does not require cost support at all, it is ludicrous for MCI to assert that the Act requires LECs to make cost support available to all interested parties, without limitation and without any opportunity to protect sensitive, confidential information.[26]

There is no legal requirement under the Administrative Procedures Act for the Commission to allow interested parties to analyze and respond to the submissions of other parties. Indeed, the only "legal requirement" is that the Commission "give interested parties an opportunity to participate in the rulemaking through the submission of written data, views or arguments with or without opportunity for oral presentation."[27] MCI is free to comment on LEC tariff filings, but that does not convey upon MCI a substantive right to have access to LEC confidential commercial information for the purpose of preparing its comments or otherwise to use such information. MCI's repeated assertion

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[25] ARINC, 642 F.2d at 1235 (citations omitted).
[26] MCI at 10, 14-15, 18, 19.
[27] 5 U.S.C. Sec. 553(a). See, Chemical Leaman Tank Lines, Inc. v. USA, 368 F.Supp. 925, 946 (D. Del. 1973).

that it has statutory or due process rights to access confidential cost support information in a tariff review proceeding is without merit, and should be rejected.

There being no "legal requirements" that tariff cost support information be disclosed publicly, MCI falls back on the assertion that the "established practice" of the Commission has been to "require public filing of cost support for tariffs."[28] While that has certainly been the Commission's past practice, the Commission has afforded protection to confidential cost support information on numerous occasions.[29] In any event, MCI's argument is completely beside the point since the whole purpose of this proceeding is to determine what the Commission's future policy should be in this regard.

In arguing that the Commission should deny LECs their statutory rights under FOIA Exemption 4, MCI simply ignores the legitimate private and public interests involved in protecting confidential commercial information in regulatory proceedings. There can be no question that the detailed cost and demand information filed with the Commission to comply with Section 61.38 of the Rules is the type of confidential commercial and financial information that Exemption 4 was designed to protect. MCI fails to offer any legitimate reason, other than its own self-interest, for permitting LEC competitors to have unrestricted access to such information. To the extent that the

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[28] MCI at 16-17.

[29] See, e.g., Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 5058 (1991); Letter from Kathleen M. Wallman, Chief, Common Carrier Bureau, FCC, to John L. McGrew, Esq., Wilkie Farr & Gallagher, August 11, 1995, FOIA Request Control No. 95-223. See also Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 949, Order, DA 96-821, released May 22, 1996; Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 2547, 2552, Order, DA 96-1011, released June 21, 1996.

Commission continues to invite public participation in the tariff review process, it can permit limited access to confidential information through the use of protective orders.

## III. The Commission should not adopt changes to its Model Protective Order that would reduce the protection afforded to confidential information.

Most parties agree that the use of protective agreements is a legitimate way to provide access to confidential information for the limited purpose of participating in Commission proceedings. Some parties propose amendments to the Commission's Model Protective Order that would undermine the essential protection that the order was designed to provide. For example, Time Warner Communications Holdings, Inc. ("TWComm") urges the Commission to revise the Model Order "to allow the use of the information in question in other proceedings as well, if the Commission finds that such use would be in the public interest."[30] Specifically, TWComm proposes that confidential information received pursuant to a protective order in an "ILEC A" tariff review proceeding be available for use to make "benchmark comparisons" in an "ILEC B" tariff review proceeding.[31]

The Joint Parties strongly oppose this suggestion. Any marginal benefit from such "benchmark comparisons" is greatly outweighed by the prejudice to both LECs involved. "ILEC A" would have its confidential information used in an unrelated proceeding to which it would normally not even be a party. It would be forced to participate simply to protect its confidential information. "ILEC B" would be faced with "benchmark comparisons" of dubious relevance based on information to which it has no access. "ILEC

[30] TWComm at 11-12.
[31] TWComm at 12.

B" would therefore be forced to enter into a protective agreement with "ILEC A" to gain access to the confidential information of "ILEC A". Such proliferation of uses of confidential information and of protective agreements would make enforcement of such agreements problematical, and would greatly increase the administrative burdens associated with participating in tariff review proceedings. The Joint Parties urge the Commission to retain the requirement that use of any information received pursuant to the Model Protective Order be limited to the proceeding in which the information is produced.

The Joint Parties also oppose TWComm's request that the Commission eliminate from the Model Protective Order the requirement that reviewing parties "agree not to use information derived from any confidential materials to seek disclosure in any other proceeding."[32] All uses of confidential information obtained through a protective agreement in a proceeding should be limited to that proceeding, and should be subject to no other uses. Otherwise, the enforceability of the protective agreement will be severely eroded, and the willingness of owners of confidential information to make such information available pursuant to a protective agreement will be diminished.[33] Moreover, the rule proposed by TWComm gives incentives for parties to game the regulatory process by seeking additional confidential information in one proceeding to stockpile for use in unrelated proceedings. Thus, such a rule is likely to increase the number of disputes concerning confidential or proprietary information.

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[32] TWComm at 12, n.18.

[33] The Joint Parties disagree with the observation of GCI at 13 that "Release of materials pursuant to a protective order is not likely to reduce submitters' willingness to provide information voluntarily to the Commission." If the submitter believes that the terms of the protective order are inadequate, the submitter is unlikely to agree to provide confidential information pursuant to that order.

In the event that the disclosure of confidential or proprietary information, even pursuant to a protective agreement, may result in damage to the submitting party, the Joint Parties concur with the suggestion of CBT that the Commission utilize the procedure undertaken to protect from disclosure Bellcore's proprietary interest in its Switching Cost Information System computer model during the investigation of the open network architecture tariffs.[34] Such procedures enable the Commission to obtain the benefit of competitor's comments in the tariff review proceeding without subjecting the submitter to direct disclosure of confidential and/or proprietary information. Of course, the independent party reviewing the material must itself be subject to a nondisclosure obligation.

## IV. The Commission should not negate the Critical Mass standard through an overly expansive interpretation of the concept of a "required" filing.

General Communications, Inc. ("GCI") asks the Commission to emasculate the Critical Mass [35] standard for granting confidential treatment to information voluntarily submitted to the Commission. GCI asserts:

> According to the Department of Justice and decisions following Critical Mass submissions should not be considered voluntary if they are made pursuant to an agency proceeding.[36]

[34] CBT at 3, citing In Re Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (1992).
[35] Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992)(Critical Mass").
[36] GCI at 11.

Thus, GCI apparently would consider as "required" all information submitted to the Commission in all proceedings. In advocating such an extreme view, GCI misstates both the jurisprudence and the position of the Department of Justice.

GCI cites McDonnell Douglas Corp. v. NASA, 895 F.Supp. 316 (D.D.C. 1995) as support for its proposal. In that case, the District Court reaffirmed its earlier holding that competitive bid information was exempt from disclosure under the "substantial competitive harm" prong of National Parks.[37] While the case was pending on appeal, the requester withdrew its FOIA request. The Court of Appeals then vacated the judgment of the District Court and dismissed the appeal as moot.[38] Thus, McDonnell Douglas does not provide any precedent for expanding the concept of a "required submission" under Critical Mass.[39]

In the FOIA Update cited by GCI, the Department of Justice expressly states:

> The existence of agency authority to require an information submission does not automatically mean that the submission is "required." The authority must actually be exercised by the agency for the submission to be deemed "required" in a given case.[40]

In the view of the Department of Justice, an information submission is "required" by an agency only "through the adoption of a regulation or the issuance of a subpoena.[41] Thus, neither the case law nor the Department of Justice supports the extremely broad

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[37] 895 F.Supp. at 317, citing National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974)("National Parks").

[38] McDonnell Douglas Corp. v. NASA, 1996 U.S. App. LEXIS 10770 (April 1, 1996)("McDonnell Douglas").

[39] See also, Environmental Technology, Inc. v. EPA, 822 F.Supp. 1226 (E.D. Va. 1993)(Holding that information submitted to the EPA in response to a request for bids was "submitted voluntarily" for purposes of applying Critical Mass.)

[40] "FOIA Update", U.S. Department of Justice, Vol. XIV, No. 2 (Spring, 1993) at 5.

[41] FOIA Update at 5.

view of a "required submission" advocated by GCI. The Commission should not restrict its ability to protect confidential information submitted voluntarily to the Commission in the manner suggested by GCI.

## V. Conclusion.

The Joint Parties urge the Commission to recognize that with increased competition in the telecommunications marketplace comes the need to provide increased protection to confidential information of regulated entities. The Telecommunications Act of 1996 contemplates a deregulatory paradigm that reduces reliance on traditional regulatory methods in favor of the operation of competition. The use of the regulatory process to obtain confidential commercial and financial information from a competitor is contrary to the public interest, and should not be allowed except where a compelling public interest showing is made by the requester. In such circumstances, the Commission should allow only restricted access pursuant to a protective order or redaction. The Model Protective Order should be amended as suggested by the Joint Parties in their comments, and should not be weakened as suggested by LEC competitors.

Respectfully submitted,

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**US WEST, Inc.**
By its Attorney:

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**BELLSOUTH CORPORATION**
By its Attorney:

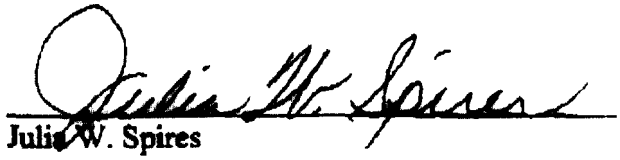
M. Robert Sutherland

Suite 1700 - 1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

July 15, 1996

## CERTIFICATE OF SERVICE

I Julia W. Spires, do hereby certify that I have this 15th day of July, 1996, serviced all parties to this action with the foregoing "REPLY COMMENTS" reference GC DOCKET 96-55, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid addressed to the parties as set forth on the attached service list.



Julia W. Spires